

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD BROWN,

Plaintiff

v.

KEVIN SMITH, et al.,

Defendants

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Civil No. 3:12-CV-446

(Judge Kosik)

(Magistrate Judge Carlson)

MEMORANDUM ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

This case came before the court on cross motions for summary judgment filed by the *pro se* inmate plaintiff, Richard Brown, and the defendant correctional officials. (Docs. 60 and 67.) In these cross motions for summary judgment, the parties each insisted that they were entitled to a judgment in their favor as a matter of law on the question of whether Brown fully and properly exhausted his administrative remedies within the prison system prior to filing this lawsuit, a legal prerequisite to filing a lawsuit in federal court. The parties, however, advanced these competing summary judgment motions against the backdrop of a factual record marked by sharply disputed factual claims, a dispute which was compounded and complicated by the fact that a crucial piece of evidence was missing, Brown's final administrative appeal, a document which neither party had produced. Given these factual disputes, and the

absence of a centrally important exhibit, Brown's final administrative appeal, we found that the question of administrative exhaustion could not be resolved as a matter of law in favor of either party, and recommended that these cross motions for summary judgment be denied. (Doc. 72.)

The defendants have now moved to supplement the record, attaching a copy of Brown's final administrative appeal. (Doc. 73.)¹ In order to allow all parties to fully address this exhaustion issue in light of the proffer of this additional evidence, IT IS ORDERED as follows:

1. The motion to supplement is GRANTED. (Doc. 73.)
2. The Report and Recommendation previously filed in this case (Doc. 72) is WITHDRAWN.
3. The parties are ORDERED to file supplemental briefs addressing their positions on the cross motions for summary judgment in light of the newly filed exhibit, Brown's final administrative appeal, on or before **January 8, 2016.**

¹We commend the parties for securing this exhibit, but note without deciding that the exhibit itself may provide new disputed factual issues since the document, (Doc. 73-2) bears two dates, a handwritten date of October 21, 2011, which would make the appeal timely, and a date stamp of November 14, 2011 which would render the final appeal untimely.

So ordered this 18th day of December, 2015.

S/Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge